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No. 06-320

IN THE

Supreme Court of the United States

ABLE BUILDING MAINTENANCE CO., PETITIONERS

v.

BOARD OF TRUSTEES OF GENERAL EMPLOYEES TRUST FUND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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-REPLY TO BRIEF IN OPPOSITION

I. THE NINTH CIRCUIT'S OPINION CREATED AN UNWARRANTED EXTENSION OF ARBITRATION POWERS

Petitioner maintains the issue improperly arbitrated by Respondent (improper contributions) fell outside the scope of the trust indenture agreement, and was therefore not subject to arbitration. The District Court agreed with that position in this case. Respondent knew the District Court ruled in a prior case by Respondent against a company sharing joint ownership with Petitioner that "improper contributions" were not recoverable in Respondent's suit for damages arising out of the Agreement, before Respondent set this subject arbitration, to which Petitioner objected. The Ninth Circuit's opinion, at issue here, however found on *de novo* review, where there is a self-executing agreement to arbitrate, any opposition to arbitrability must be first addressed at the actual arbitration hearing, or is otherwise waived. (As previously indicated, the issue of a self-executing agreement was neither briefed nor discussed at the hearing on the matter before the Ninth Circuit.) Such a finding is an unwarranted extension of power to an arbitrator, making determinations in a trust indenture, regulated and controlled by Federal law, including ERISA and the Labor Management Relations Act. [See, App. 9a,Trust Indenture Article IX, Section 9.4]

The Ninth Circuit relied on *National Marble Company of California, Inc., v. Bricklayers and Allied Craftsmen, Local No.2 et al,* 184 Cal.App.3d 1057(1986), to support its requirements for raising

arbitrability at arbitration prior to seeking court intervention. The issue in that case was limited, as pertinent, to whether or not the Trust board's authority, pursuant to a self-executing agreement to arbitrate, had terminated by the time of the board's determination and award. The court, after arbitration in *National Marble* was final, determined that the agreement did not expire until after the award was made, and therefore was binding on National Marble. No determination was ever made as to what should happen with self-executing agreements that attempt to enforce arbitration of issues which were not covered in the Agreement.

Although an agreement to arbitrate may be self-executing, it should be basic that the issue to be arbitrated must be one that the parties have agreed to arbitrate. That tenet has been either lost or ignored by allowing a "self-executing" agreement to be implemented, requiring the arbitration of an issue outside the agreement to go forward without a judicial determination that the issue decided was arbitratable. The application of a "self-executing" agreement cannot be so mechanically applied that it precludes a party, who raises an issue of arbitrability, from first raising the matter with a court determination. Such mechanical application flies in the face of current law. *Carpenters 46 Northern California Counties Conference Board v. Zcon Builders, et al.*, 96 F.3d 410, 414 (9th Cir. 1996).

Case law demonstrates the risk in appearing at the arbitration to raise the issue of arbitrability. In *George Day Construction Co. v. United Brotherhood of Carpenters and Joiners*, 722 F.2d 1471 (9th Cir.

1984), because the employer, objecting to arbitrability of the claim, appeared and participated in the merits of the arbitration, the court found it consented to the arbitrator's right to determine arbitrability. Likewise, *Orion Pictures*, discussed below, lost the ability to contest arbitrability, because it appeared at the arbitration. Only where the objecting parties did not appear, was the issue of arbitrability preserved. *See, Carpenters 46 N. Ca. Cos. Conf. v. Zcon Bldrs*, 93 F.3d 410 (9th Cir 1996); *Pacesetter Const. v. Carpenters 46*, 116 F.3d 436 (9th Cir. 1997).

Where, as here, the issue to be determined is not part of the Agreement, a self-executing agreement should not apply. Rather, if California law applies, arbitration of such an issue should require the filing of a petition to arbitrate the disputed issue. Then, the provisions of the Code of Civil Procedure §1281.2, fashioned by the legislature, would be available to resolve disputes as to arbitrability. In pertinent part, Section 1281.2 provides:

> On the petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists. . . ."

That Code section acts in concert with the holding of the Ninth Circuit requiring the court to review arbitrability. A self-executing agreement to arbitrate, without any consideration as to content, if

governed by the Ninth Circuit opinion in this case, forecloses the due process alternative. Such outcome foils the fundamental principles of what is allowed to be arbitrated.

The cases cited by Respondent to support its contention that federal law has the same holding as *National Marble* are not on point. *Orion Pictures v. Writers Guild Of America*, 946 F.2d 722 (9th Cir. 1991), clearly sets forth the terrible quagmire that is created from a conclusion that self-executing agreements apply where arbitrability is contested. Orion, a non-signatory to the bargaining agreement, when faced with a self-executing agreement, could either participate in the arbitration, giving up its right to contest the arbitrability, or not participate and risk the possibility of having an award enforced against it. It opted to participate by asking for a dismissal or, in the alternative, a stay in the proceedings, to allow the court to rule on the arbitrability. The arbitrator ruled that it could determine the arbitrability of the matter and suspended the action to allow Orion to pursue its court ruling. The District Court found that the arbitrator was not authorized to decide arbitrability. Writers Guild appealed. The appellate court found that it could not support the District Court ruling under Section 301 of the Labor Management Relations Act as the arbitrator's rulings were not a final determination. *Id.* at *Orion Pictures*, 946 F.2d at 725. It also determined that because the issue of arbitrability had been submitted to the arbitrator, the District Court's review would have been limited to determining if the arbitrator's ruling represented a "plausible interpretation" of the CBA. The appellate court found that because Orion had submitted the matter to the

arbitrator, in subsequently requesting a dismissal or a stay of the proceedings, it had waived its right to seek de novo judicial determination. *Id.* at *Orion Pictures*, 946 F.2d at 726. By taking the actions that Orion did, it was precluded on all fronts from addressing the fact that it did not sign the agreement under which the arbitration was conducted. The outcome appears incorrect and unfair, but that very action is precisely what the Ninth Circuit indicated Able should have done in this instance. The result was that Orion Pictures was left with no alternative to raise the issue that it was a non-signatory to the Agreement.

Toyota of Berkeley v. Local 1095, 834 F.2d 751(9th Cir. 1987), likewise, is not on point. That employment dispute case addresses an arbitration, where a court order was not needed as the parties had agreed to arbitration, and the arbitrator was accused of bias. Toyota claimed the grievance was untimely and refused to attend the arbitration on that ground. The appellate court's determination rested on whether due process was satisfied as the arbitration was conducted in an ex parte manner. The appellate court found that Toyota had, over a three year period, acted as if it would participate in the subject arbitration. It agreed on the selection of the arbitrator, it confirmed the initial date and location of the hearing, and it agreed to a postponement. Thereafter, unexplained, Toyota reversed its position and sought a restraining order. A restraining order did issue, but was provided to the arbitrator after the hearing which was conducted without Toyota being present. In this situation, due process was not found to be violated because the arbitrator was found to have attempted to avoid going

forward with the proceedings without Toyota's presence. Nothing in the case provides guidance as to the application of self-executing arbitration rules.

Respondent here claims that had Able simply appeared and voiced its objection to the arbitration, without arguing the merits, its objections would have been preserved. A review of *Orion Pictures* does not support that projected outcome; rather it is likely that Able would have been found to have consented to allowing the arbitrator to determine the arbitrability.

Respondent further claims that because none of the cases cited by Petitioner addressed "self-executing" provisions, their significance is without merit to this dispute. Respondent, however, fails to acknowledge that the cases cited by Petitioner show that arbitration is not to be involved with matters not covered by the Agreement. A party cannot be required to submit to arbitrate a dispute that has not been agreed to arbitrate, and unless clear and unmistakable provisions indicate the parties agreed to be bound by other provisions, only that which is the subject of the Agreement is fair game for arbitration.

To use a "self executing" provision to encompass content that was not agreed by the parties to be included in the Agreement, clearly gives an undue advantage to one side. Such disadvantage should be eliminated, and the original playing field should be restored. Where the "self executing" agreement covers an issue found within the Agreement, its application is proper because the parties have agreed to such. Where, however, the issue raised is not included or

addressed in the Agreement, then the general rule which has a court make the determination as to arbitrability is the better rule.

II. A COMPELLING REASON EXISTS TO GRANT CERTIORARI

The ruling of the Ninth Circuit requires that a party opposing an arbitration, under a self-executing agreement, in California on grounds of arbitrability must first appear at the arbitration, raise the issue of arbitrability, and proceed with the arbitration, in order to preserve its right to have the court determine the issue after the award is rendered. According to the Ninth Circuit, based on *National Marble Company of California, Inc., v. Bricklayers and Allied Craftsmen, Local No.2 et al.*, 184 Cal.App.3d 1057 (1986), if the party does not appear, as here, it will be found to have waived the issue.

The ruling creates a quagmire and places the party opposing the arbitration in an untenable position. Ninth Circuit cases hold that once the parties have submitted the issue of arbitrability to the arbitrator, and the arbitration is concluded, the party moving to vacate the award based on arbitrability, will likely be found to have consented to the jurisdiction of the arbitrator. Therefore the Ninth Circuit's ruling in this case has, in essence, made the application of a self-executing agreement to arbitrate so mechanical, it has stripped the rights of a party seeking a judicial determination of arbitrability, where an opposing party compels arbitration of an issue not covered in the Agreement subject to arbitration.

CONCLUSION

For the reasons set forth in the Petition, and this Reply, Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

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ARTICLE IX AMENDMENT AND TERMINATION

Section 9.1. Amendment of Trust Indenture.

This trust indenture may be amended at any time by a written instrument duly executed by the trustees provided that no such amendment shall:

1. Invest or reinvest any part, or interest in the trust fund in any employer, the union, any employee, any beneficiary or any other interested party.

2. Make possible the diversion of any part of the trust fund to any purpose other than the exclusive benefit of beneficiaries.

3. Disriminate in favor of employees of any employer who are officers, shareholders, persons whose principal duties consist of supervising the work of other employees, or highly compensated employees of such employer.

Section 9.2. Authorization of Trustees. Each employer who is or becomes a party hereto, each member of the union, and the union, and each present and prospective beneficiary who is or may become at any time entitled to receive any benefits, particularly authorizes the trustees to amend or terminate this trust indenture as herein provided.

Section 9.3. Limitations of Modifications and Amendments. If the trust indenture is modified or amended, then the trustees and each of them shall have the option to accept the modification or amendment and continue in office, or to resign. No modification or amendment shall retroactively increase the duties, obligations, responsibilities or liabilities of the trustees or any of them. No modification or amendment shall prospectively increase the duties, responsibilities or liabilities of the trustees, or any of them, without their consent.

Section 9.4. Conformation of Trust Indenture, to Governing Law. It is contemplated in the collective bargaining agreements out of which this trust indenture arose that the provisions of this trust indenture, insofar as they are controlling on the subject, shall at all times be and remain such that they comply with the provisions of the Labor Management Relations Act, 1947, the Welfare and Pension Plans Disclosure Act, Rees-Foyle Act, and any other applicable valid Federal or State law or rule or regulation.